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No. A-77

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HELEN M. AMBROSE,

Petitioner,

vs.

SPERRY RAND CORPORATION, a Delaware Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Rule 23 (d)(2) and (e) mailed notice(s) to the plaintiff class, under all of the circumstances present, were constitutionally sufficient absent notice of fact and apprisal that co-counsel held appearance of or potential for conflict of interests?

Ruling below: Yes.

2. Whether plaintiff class counsel and co-counsel were adequate representative parties under Rule 23 (a)(4) and constitutionally sufficient representatives for plaintiff class?

Ruling below: Yes.

3. Whether the application of the rules, procedures adopted, and judgments rendered were within the proscriptions of the Rules Enabling Act §2072 (1966) and constitutionally sufficient?

Ruling below: Yes.

4. Whether final judgment order is entitled, under Rule 23 or constitutionally, to full faith and credit?

Ruling below: Yes.

THE PARTIES*

The two parties are listed in the Caption.

*Petitioner does not intend to abandon claims as to other parties who may later claim or be deemed to be parties of interest.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States Articles of Amendment.

Amendment 5:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . . .

Amendment 6:

> . . . to have assistance of counsel . . .

Amendment 14:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The Rules Enabling Act §2072 (1966):

> The Supreme Court shall have the power to prescribe by general rules . . . and the practice and procedure of the district courts and courts of appeals. . .
>
> Such rules shall not abridge, enlarge or modify any substantive right [and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution].

Federal Rules of Civil Procedure Rule 23:

Rule 23 Class Actions:

(a)(4) the representative parties will fairly and adequately protect the interests of the class.

(c)(2) In any class action maintained under (b)(3) the court shall direct to the members of the class the best notice practicable under the circumstances, . . .

(d)(2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members of any step in the action, . . ., or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(d)(3) imposing conditions on the representative parties . . .

(e) A class action shall not be dismissed without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

STATUTORY PROVISIONS INVOLVED

United States Code Title 28:

§ 455(a). Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, . . .

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Helen M. Ambrose respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding that is identified as No. 84-5183-MN and entered on March 11, 1985 and upon re-hearing entered on May 13, 1985. No. 81-5183 derives from Civ. 4-74-627

OPINION BELOW

The opinion of the Court of Appeals, not yet recorded, appears in the Appendix hereto as does the relevant orders, judgment and correspondence of the court of first instance.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 11, 1985. A timely petition for rehearing was filed, heard and opinion rendered on May 13, 1985. Petitioner filed a request to the Supreme Court for a time extension in which to file for writ of certiorari on July 20, 1985. Time extension granted to and including September 10, 1985.

This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Named plaintiffs, Delores Elliott (hereinafter Elliott) and Helen Ambrose (hereinafter Ambrose or Petitioner) engaged the law firm of Hvass, Weisman & King[1] (hereinafter Hvass) to file a civil action (4-74 Civ. 627) on behalf of Elliott and Ambrose and all other women similarly situated against Sperry Rand Corporation (hereinafter Sperry), the International Brotherhood of Electrical Workers Union (hereinafter IBEW), and the Local Union No. 2047 of the IBEW (hereinafter L.U. #2047) for sex discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 USC §2000-e *et seq.*, the Labor Management Relations Act, 29 U.S.C. §157 et Seq., etc.

Hvass filed the original Complaint on December 9, 1974 after substantial investigative research whereby Hvass became fully acquainted that the claims made against Sperry

[1]Plaintiffs came to engage the Hvass firm through the happenstance of seeking aid from MPIRG (Minn. Public Information & Research Group). They agreed to run a "computer sort" (at plaintiffs expense) of the promotion practices of Sperry from a seniority roster supplied by Elliott and Ambrose. The task was assigned to Jean Hvass who was a student and the daughter of Charles Hvass, Sr.

and the IBEW Unions which included assembly work, tools and machine operation assignment, inspection job task and testing equipment job assignment. Hvass knew that the dominant area of experience of Ambrose would be in assembly and attendant tool and manufacturing machine operation job assignments and that Elliott's dominant experience would be in Sperry's inspection job tasks and attendant inspection test equipment operation assignments.[2]

Shortly after filing the Complaint Hvass called a conference to advise Elliott, Ambrose and Roberta Pettit (Pettit, an officer of the Nat'l Organization for Women, was later dismissed for lack of standing to sue) that another client of his office (the Teamster Joint Council #32 of Minnesota) had raised an issue of conflict. Hvass claimed that there was no actual conflict but the complaint went to a remote "appearance" of conflict. No further or specific information was supplied so as to advise plaintiffs of risks to plaintiffs. Instead Hvass advised that he did not wish to spend his time and money only to "possibly" have the judge,

---

[2]Hvass was also presumptively aware of the comparatively large Inspection classes in the IBEW group at Sperry (Detail, General Inspector "B" (both lower paid and female dominated) and the higher paid and male dominated General Inspector "A"). Hvass was also presumptively aware of the dominance of the Teamster Inspection classes (60%) at Sperry and the sexual composition of the Teamster group as shown below:

Teamster Classes at Sperry	*No. & Sex of Persons*	
	Male	*Female*
Tool & Die Maker	8	0
Lead Tool & Die Maker	1	0
Tool Rm. & Mod. Shop Machinist	11	0
Experimental Machinist	5	0
Experimental Sheet Metal	3	0
Sheet metal Layout	3	0
Sheet Metal Worker	3	0
Machinist	9	0
Precision Grinder	1	0
Tool & Gage Inspector	15	0
Fabrication Inspector	23	0
Mechanical Receiving Inspection	41	2

at a later date, find an "appearance of conflict" and compel him to withdraw.

Hvass highly recommended the Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan law firm (hereinafter Meagher, Geer) as one that would give us excellent representation.

Meagher, Geer accepted employment and a Substitution of Attorney was filed on December 23, 1974 and proceeded with discovery, etc. thence foreward.

On or about March 1975 Ambrose, through the efforts of class member Joann M. Clodfelter[3] (hereinafter Clodfelter) and with forms supplied by Ambrose gathered Sperry Inspection job data from several departments at Plant #1 for the purpose of showing disparate treatment of females at those locations. That information was supplied to attorney J. Richard Bland (hereinafter Bland) of the Meagher, Geer firm on or about the time stated above. The Inspection job data consisted of;

1. The name of the department.

2. Complete identification of the Inspection test equipment including; manufacturers name, type of machine, manufacturer's code number, and the Sperry code number for the equipment.

3. Where known, names of males and females engaged in the operation of the test equipment and that females were classed in a lower paid Inspection job class while performing same work as their co-IBEW male Inspectors of the General "A" classification.

Bland did not seek to verify or to expand upon the Clodfelter information throughout litigation.

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[3]Clodfelter and Ambrose supplied the lower courts with the above information with attending affidavits.

On June 27, 1975 Ambrose wrote a letter to Bland requesting that he obtain a census of the machines in use at Sperry through discovery from the IBEW L.U. No. 2047 or from Sperry. Bland did not attempt such discovery. In the same letter Ambrose requested information as to how named plaintiffs might proceed to add other females as representatives who were non-activists or non-controversial in light of the fact that the Defendants were raising such a furor over the representation by Elliott and Ambrose via the complaint that this suit was "politically" motivated. Bland didn't believe that would be necessary.

On or about May 22, 1976 class member Jennie Hodder (hereinafter Hodder) promoted from General Inspector "B" at Sperry's plant No. 1 to Automatic Drilling Machine Operator at Plant No. 4. While at Plant No. 4 she discovered that a male Teamster Inspector was being paid more than she in the performance of the same inspection tasks she performed at Plant No. 1 in the Plating Test Lab. She asked Ambrose to verify her discovery and report same to Bland. Ambrose did so. Therefore, as early as May 1976 Bland knew that Sperry's disparate treatment of females in its Inspection department(s) implicated both the Teamster and the IBEW unions. The Hodder complaint was oft repeated to counsel during trial rest or lunch breaks.[4]

Bland failed to seek discovery of specific Job Data Paks or Inspection Test Logs to verify the Hodder complaints or to impeach the testimony of the adverse witnesses Watali Globa or Lawrence P. Curley (hereinafter Globa and Curley). Moreover, Bland failed to call Hodder as a witness at trial even though she was present, vocal, and available for six (6) of the seven (7) weeks of trial.

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[4]See App. A-76 (Hodder Aff. to Ethics Comm.).

Confirmation of the validity of the Clodfelter research and the Hodder (and Elliott had she been heard) complaint that Sperry paid women Inspectors less than male Inspectors in the performance of same work tasks and in use of same testing equipment would come late in this litigation. That confirmation, known to the lower courts, came in the form of a formal grievance filed by union Steward Mary Harrigan on behalf of five females on July 13, 1982.[5]

On May 27, 1976 Judge Earl R. Larson issued its Memorandum Order (hereinafter MO 1976) (See App. 25-62) conditionally certifying the class under Rule 23(d)(2) requiring notice to the class. The order predominates against named plaintiff's motivation for bringing this action. It marks the predisposition of the court that would surface throughout this litigation and give its final expression in the court's letter to the Eighth Circuit dated March 27, 1985 as shown in pertinent part below: (See App. 72-73).

> "Since 1970 Ms. Ambrose has been engaged in a series of attacks directed to her Local Union, the International Union, her employer, three of her law firms and now myself. The Court of Appeals is the next likely target." M.O. 1976 acknowledges the obligations of the court and counsel to each class member in a class action suit:
>
> "in the task of protecting class members from conflicting interests or ulterior motives, the Court does not stand alone. Counsel for the class are officers of the Court. When attorneys undertake representation of a class, each member of the class becomes a client. The representatives party's attorney thus owes a duty of loyalty, and a duty of zealous representation not only to named party but to all absent parties as well." (MO p. 21).

[5]See App. 95-96 L.U. No. 2047 Grievance.

The district court also acknowledged that there should be no diminution of due process rights where an entire class will be bound by judgment (See MO 1976 at pp. 11-12) as follows:

> "Where an entire class will be bound by the judgment in the action, placing the fate of the class in the hands of an inadequate representative is plainly repugnant to due process. *Hansberry v. Lee*, 311 U.S. 32 (1940). Effectuation of the social policies embodied in Title VII does not permit the dilution of the due process rights of absent class members."

The most salient feature of MO 1976 is that the court does not admit that upon certification a transfer of control of the suit goes from named parties to the court and to counsel as does the potential for misdeeds, misconduct, fraud or collusion. The omission is the more outstanding in a suit already marked by counselor Hvass' withdrawal for conflict in 1974 and (unknown to named parties until recently) marked by the lower court's own[6] "potential for appearance of conflict" owing to its own prior relationships. (See Chart at App. 77 showing the Larson, Lindquist, Teamster, Hvass, Sperry interconnecting relationships).

Defendant Sperry appealed from MO 1976 via a petition for a Writ of Mandamus in *Sperry Rand Corporation v. Larson*, 544 F.2d 868 (8th Cir. 1977) citing *Hansberry* as to adequacy of representation. Meagher, Geer responded for the lower court citing, inter alia, *Redmond* (8th Cir. 1940) that conflict must go to subject matter to defeat representative status.

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[6]Judge Larson was a law partner of Lindquist for about 15 years prior to his judgeship. That law firm now named Lindquist & Vennum. The Lindquist firm was counsel for the Teamster L.U. No. 970 at Sperry at the time this suit was filed. The Lindquist firm was also involved in the *Reynolds* case before Judge Larson (Reynolds was a union member objecting to settlement). *Reynolds* was cited by the 8th Cir. in denying petitioner's appeal.

The Eighth Circuit, on May 9, 1977, upheld the lower court stating that notice to the class was not fomenting litigation or a tacit recognition of existing antagonism going to subject matter, but was "a prudent safeguard against future antagonisms that might affect the binding nature of a Rule 23(b)(2) judgment." And at note 12 of the court's affirmation expressed about the "marginal nature of class representatives in this case." Following that remark the court expressed confidence that:

> "The experienced district judge will continue to monitor the performance of the class representatives and will take appropriate action if antagonisms going to the merits of the claim surface within the class."

Thus the Eighth Circuit joined the lower court in avoiding the common knowledge that control passed to counsel upon certification as well as the potential to visit harm upon the class.

On January 1, 1978 Elliott terminated her employment at Sperry. On April 17, and May 1, 1978 Sperry and the IBEW filed motions to revoke class certification and alternatively to amend same. On July 12, 1978 the court granted motion to re-define the class but denied motions to deny representative status to Elliott.

On March 30, 1979 Meagher, Geer issued a letter to all defendant counsel (but *not* to Elliott and Ambrose) advising that the Hvass law firm would re-enter this litigation as co-counsel for the plaintiff class. (See App. 23).

On April 9, 1979 Notice of Association of counsel for plaintiffs was filed. (See App. 22). No notice was given to named plaintiffs. No challenges were raised by defendants to the Hvass re-association. The court made no inquiry on

the record of the Hvass re-association as to whether a potential for conflict or appearance of conflict still attached to Hvass.

On June 5, 1979 the court ordered that notice be mailed to the class on June 19, 1979. The court approved notice (See App. 63-69 a three page notice) failed to inform the named plaintiffs of the Hvass re-association, or identify his past conflicts relating to his employment by the Teamster Union, or give assurance that no conflict presently attached to Hvass, or to solicit class opinion or consent to the Hvass representation. Instead the notice continued the "strawman" non-issue of adequacy of named plaintiffs who were now merely "the key to the courthouse door" for class counsel.

In the year preceding trial certain experts were hired by Meagher, Geer in support of class claims, more depositions were taken of Sperry management personnel, written statements were accepted from higher level Sperry management in lieu of depositions, one potential and important adverse witness (Sperry vice pres. Ernest Hams) was not located (unable to be subpoenaed for testimony relating to a successful Equal Pay claim by two class members), and on August 24, 1980 Bland sent a letter vaguely requesting Job Data Paks.

Plaintiff's case-in-chief began on September 8, 1980 and would conclude on October 24, 1980. Earlier the court had granted Sperry a bifrucated trial that would permit them to present their case on January 5, 1981.

Richard A. Williams, Jr. (hereinafter Williams) of the Hvass law firm appeared at trial during its second week. Elliott and Ambrose expressed surprise and inquired of Bland whether Williams was our "union expert" in the be-

lief that he was hired as were other experts for their special knowledge, but neither Bland, Williams or Jones made any effort to correct our mistaken belief that Williams was hired as an independent expert. Thus came the "implied consent" of named plaintiffs to the Hvass law firm's representation of the class.

The trial was distinguished by a continuing failure to discover the Job Data Paks, the court severely circumscribed the job analysis (PAQ) by our expert Dr. Mendel, serious errors committed by our expert Dr. Hoyt [due to using a wrong data base], hiring other experts to correct the mistake, and the disproportionate use by Bland of adverse witnesses without benefit of Elliott's testimony or other class member witnesses. That disproportion is shown below:

Plaintiff witness	*Adverse witness*	
H. Ambrose	J. Ellingboe	
*D. Elliott	F. Philipson	
Experts	D. Steenson	Sperry
R. Mendel	P. McDonnell	
R. Hoyt	B. Rienke	
Dr. Strachan	N. Nelson	
Dr. Holloway	P. Curley	
	A. Bonacorda	Union
	W. Globa	
	Sperry experts:	
	J. Hunter—depos. & report	
	D. White—depos. & report	

*Elliott testimony limited to general background. Defendants did not cross-examine.

At the break in trial settlement was briefly discussed and an understanding was reached that Sperry would deliver

Job Data Paks for our review and that Dr. Mendel would return to evaluate our (named plaintiffs and other class members) findings and evaluate same. No job Data Paks were received for said review.

On November 2, 1980 Bland sent a letter to Sperry counselor David S. Doty (hereinafter Doty) of the Popham, Haik, Schnobrich, Kaufman & Doty law firm outlining a proposal for settlement.

On December 12, 1980 Judge Larson, from the bench, denied all defendant's Rule 41(b) Motions to Dismiss. During argument (p. 25) William Z. Pentalovitch (counsel for the IBEW from the law firm of Maslon, Kaplan, Edelman, Borman, Brand & McNaulty) made the following statement in argument:

> "This case could have far reaching implications for the labor movement. Up until now there has been no coherent development of judicial philosophy for applying Title VII to labor unions."

Not surprisingly that view was shared by Hvass' employer-Teamster Union Joint Council who consented to the Hvass representation on the understanding that the Teamster's would not be drawn into this case or one similar to it. (See App. 74-75 December 2, 1980 Carol Grant's letter to Ambrose at p. 1).

On or about December 22, 1980, on a visit to the Meagher, Geer offices Elliott was advised by Jones that;

1. Charles Hvass, Sr. was conducting settlement negotiations with Doty upon Doty's request or preference.

2. Offered the explanation that Hvass represented Doty on another case before the Eighth Circuit in St. Louis.

3. That Hvass never had a conflict but that it was instead a political problem resolved some time ago by the election of new leadership in the Teamster L.U. #970 at Sperry.

During that same time Bland deposed Sperry's experts Dr. Halbert White and Dr. John Hunter and received their reports.

On December 30, 1980 Bland called named plaintiffs to his office to report the Sperry settlement proposals:

1. That the Hunter report had destroyed the class major money claims.

2. That Dr. Mendel had recommended settlement be accepted.

3. Explained that Hvass represented Doty in a case before the Eighth Circuit in St. Louis and justified the Hvass interpolation with the claim that Sperry offered only $750,000 dollars in settlement but that Hvass was able to get 1.5 million for the Class.

4. That he (Bland) could not improve upon the terms proposed and that final language was only thing left to complete.

Elliott and Ambrose made strenuous objections to all aspects of the settlement. We requested a copy of the terms. None was available. Bland requested our response as soon as possible. It is noteworthy that a settlement term "straw-man" was included in the settlement terms that was not at issue in trial. The proposed settlement term was to institute "plant" seniority as opposed to the preferred "company wide" seniority and thus debilitating job seniority protection rights. It was a term certain to cause wide-spread panic. It

did. That provision was dropped and then "used" to show that named plaintiffs had "input" into the negotiation process.

On January 6, 1981 named plaintiffs were called to a meeting at the Meagher, Geer offices. The "merits" of accepting settlement were discussed with Charles Hvass, Sr., Bland, Williams, and Jones. Named plaintiffs refused to accept or approve settlement terms.

Named plaintiffs telephoned Dr. Mendel to verify his recommendation for settlement as alleged by Bland and discovered that:

1. Bland lied to Dr. Mendel in telling him that we had received and reviewed the Sperry Job Data Paks but were unable to discriminatory "cross-over" in job task assignments.

2. Bland lied to Dr. Mendel by telling him that named plaintiffs had agreed to settlement terms.

3. That Dr. Mendel did not recommend settlement.

4. That Dr. Hunter had not "destroyed" our major money claims but that Mendel analysis of the Hunter report only showed both good and bad reasoning and was thus subject to refutation and the court's judgment.

5. That Mendel was suprised at the 1.5 million settlement because Bland had advised him that that amount was offered at trial.

By letter dated January 13, 1981 Elliott and Ambrose advised the court of our complaints and concern. (See App. A-89). Judge Larson did not acknowledge the letter at any time and appears to deny receipt in his Memorandum Order of May 31, 1984 (at P.3).

On January 15, Elliott suffered a stroke, was hospitalized, recovered sufficient to give further but measured representative effort. The representation efforts made by Elliott, Ambrose, Hodder and other class members include the following;

- Rented meeting halls to conduct open discussions on settlement proposals.
- Named plaintiffs hired counselors Donna L. Roback and Judith M. Wolf (hereinafter Roback and Wolf).
- Conducted several "fund raisers" to pay attorney fees and costs.

On May 20, 1981 class counsel and defendants signed a settlement agreement and a court approved notice was mailed to the class. (See App. 69-71). The notice was defective in the following respect;

1. Hvass was not identified as co-counsel for the class or identified as previously (or presently) harboring conflicts of interest going to issues at trial or of having the potential for conflict owing to the simultaneous representation of the Teamster Unions or of having the appearance of conflict in his representation of Doty.

2. The notice failed to advise the class of all of the settlement terms or that the terms relinquished class counsel representative obligations to the court as to monitoring compliance and enforcement.

3. The notice contained the misleading statement that "The Court must approve this settlement". Thus giving the impression of a "fait accompli" to those who might otherwise object to settlement.

4. The notice failed to advise class members that the named plaintiffs did not approve of the settlement terms.

On July 18, 1981 named plaintiffs filed a complaint against class counselors with the Lawyers Professional Responsibility Board who referred the complaint to the Hennepin County Ethics Committee. Carol Grant (of the Meshbesher, Singer & Spence law firm) was assigned as the investigating attorney. After certain submissions by the parties, Carol Grant issued her findings on November 17, 1981. (See App. 78-79). Ambrose objected.

On December 2, 1981 (See App. 74-75) Carol Grant advised that the investigation would continue and she provided other data obtained from Hvass. That information was that; the Teamsters consented to the Hvass representation of the class on the condition and belief that the Teamsters would not be drawn into this or a similar lawsuit and that; the 1974 conflict issue arose out of the similarity* of machinist type of work between Teamsters and IBEW at Sperry. Ambrose believed that the Machinist Helper class of the IBEW was "dead" class at Sperry and that Hvass lied to Carol Grant. Ambrose researched through seniority rosters of past years and confirmed that belief and submitted that, and other, information to Carol Grant in several subsequent mailings. The information demonstrated that conflict arose out of the Teamster and IBEW Inspection classes. The information was mailed by certified and registered mail. Carol Grant did not respond until March 5, 1982 to advise that the investigation was concluded and she assumed that petitioner was so advised. The LPRB ultimately decided that the case was closed on December 2, 1981 with no finding of fault. Thus the case was closed retroactively to avoid the Hvass misrepresentations to Carol Grant. And thus the

*That "similiarity" of work remark marked the "dawning" of named plaintiff's understanding of the Hvass conflicts.

lower courts here embraced the LPBR decision in their respective memorandum, opinions and orders.

The Fairness Hearing to determine whether the Court should approve or disapprove settlement was had on July 27, 1981 and included the following pertinent events;

1. The court permitted Bland the obviously conflicting role of spokesman for those members in favor of settlement and spokesman, editor, censor, interpretor and critic of those members who opposed settlement.

2. Bland failed to read the Hodder written objection that implicated the Teamsters.

3. Bland disparaged those members who elected to file "form" objections but not those members who "accepted" settlement on little more than faith or resignation.

4. The court failed to advise objecting members of appeal as a matter of right or to appoint counsel in the exercise of that right.

5. Over 700 members objected to settlement of a 3000 member class.

The Fairness Hearing was continued to July 30, 1981 for the purpose of hearing matters relating to attorney fees and costs. The hearing became resounding testimony that the lower court had no intention of applying Rule 23(a)(4) to counsel as it did so vigorously to named plaintiffs in its Memorandum Order of 1976. Defendant counselors and class counselors executed the same 180° turn and stoutly defended the Hvass representation (pp. 188-199 of the Hearing Minutes). (See App. 79-88).

The court refers to the raising of question of attorney conflicts of interest as a "side issue" and complains that "we have enough important problems here to resolve". (pp. 197-98). Thus the integrity of the trial and the due process rights of class were subordinated and cast aside for the "im-

portant problem" of determining whether and how much the lawyers were going to be paid.

The court spoke disparagingly with regard to named plaintiffs (p.193).

On August 12, 1981 Judge Larson issued a Memorandum Order with Judgment entered on August 19, 1981 approving class counsel fees and costs and all other terms and conditions of the settlement, but denying attorney fees and costs to named plaintiff's counselors Roback and Wolf.

Roback and Wolf file Notice of Appeal on September 14, 1981 and appeal brief on November 16, 1981 (raising the Hvass conflict issue but failing to cite case authority). Oral argument was had in May, 1982 (at which time named plaintiffs received a copy of the appeal brief and Roback's explanation that she was unable to find any case authority on the Hvass conflict). At least as early as February 5, 1982 Roback and Wolf were aware of the direct conflicts of interest held by Hvass but the appeal was not amended.

On July 23, 1982 the Eighth Circuit upheld the lower court in all respects but reversed on the issue of attorney fees and costs for Roback and Wolf ordering attorney fees to be taken from class counsel's fee award fund. Ultimately, the lower court approved (conditionally) fees in the amount of $20,000 and costs in the amount of $601.77.

Distribution of class monetary award took place after expiration of appeal time limits. Petitioner declines to accept her individual monetary award in continuing protest against this travesty that would parade as a fair trial before an impartial tribunal.

Defendant Sperry filed a Motion for a Final Judgment Order on November 29, 1983 with hearing set for December 6, 1983. Named plaintiffs dismissed Roback and Wolf. Am-

brose filed a Motion in Opposition on December 6, and filed Substitution of Attorney *pro se* on December 9, 1983. On December 6, 1983 the court allowed time extensions to the L.U. No. 2047 and to *pro se* plaintiff Ambrose to December 12 and 27 respectively. Class counselors failed to make an appearance on behalf of the class on December 6th and 12th save for Williams, who appeared on the 6th of December but who elected to sit in the spectator section of the court room and remain silent.

On December 27, 1983 the following events transpired;

1. Petitioner filed Notice and Motion to Invalidate Settlement and Stay Order for Judgment with accompanying Memorandum and Affidavits from several class members:

2. Submitted evidence and exhibits to the court, that included Sperry's own records, showing among other things that Sperry was not in compliance with settlement terms in several material ways (promotions and meeting EEOC standards); that Sperry arbitrarily modified settlement terms to merge two job classes; and that Sperry gave arbitrary and capricious interpretation to certain terms, and;

3. Class member Jennie Hodder testified to her previously stated complaints re: Teamster/IBEW male Inspectors being paid at a higher rate of pay than she in the performance of same work, and;

4. L.U. Pres./Bus. Mgr. testified in harmony with Sperry by and large, and;

5. Class counsel Jones appeared on behalf of the class, allegedly, and complained that Final Judgment should not issue for the reasons that Sperry had not established complete compliance but was merely asserting

compliance with settlement terms (save for showing monetary fund distribution efforts); complained that Sperry's counselor Doty had not honored his requests for a copy of the Hay job analysis reports; and Jones opposed the Ambrose Motion to Invalidate Settlement on all points including the Hvass conflicts of interest, and;

6. The court complained that a finding of the Hvass conflicts would necessitate the nullification of all past decisions including those of the Eighth Circuit Court of Appeals, etcetera.

The total record submitted to the court on December 27, 1983, and subsequent to that date, clearly preponderated in favor of this petitioner's position on the issues presented. The court found to the contrary. All petitioner's Motions made prior or subsequent to the December 27, 1983 hearing were denied by the court. Petitioner appealed. (No. 81-5183 MN). The Eighth Circuit Court of Appeals affirmed and (on re-hearing) re-affirmed the lower court. (See App. 1-24). In consequence thereof, petitioner now petitions This Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the writ. First, the decisions below conflict directly with this Court's decisions in *Hansberry* (1940), *Mullane* (1950), *In re Four Seasons* (1974) and *Evitts* (1985). Those decisions made it clear that courts below who adopt procedures that abridge due process rights of interested parties lose jurisdiction and full faith and credit of judgments and that the "touchstone" of due process is adequacy of representation and fair notice.

Second, the decisions below directly conflict with the Fifth, Sixth, and Fourteenth Amendments to the Constitu-

tion as to right to equal protection of all of the laws, adequacy of counsel, and a fair trial before an impartial tribunal.

Third, the decisions below and the procedures adopted directly conflict with the Rules Enabling Act §2072 (1966) which circumscribes the lower courts discretionary power to that which shall not abridge, enlarge or modify substantive rights of parties in interest.

ARGUMENT

I.

THE DECISIONS BELOW ARE IN DIRECT CONFLICT WITH PRIOR RULINGS OF THIS COURT.

This petitioner argues that the Appellate and District court's judgments rendered subsequent to *Sperry Rand Corp. v. Larson,* 554 F.2d 868 directly conflict with This Court's decisions in *Hansberry* (fair notice and adequacy of representative party(s); *Mullane* (informed notice); *Gonzales* (adequacy of representation); and *Evitts* (constitutional right to effective assistance of counsel). Additionally, the decisions below conflict with other circuits or cases in their embrace of this Court's decisions or due process requirements such as: *Pettway v. American Cast Iron Pipe Co.,* (1978) 576 F.2d 1157, 99 S. Ct. 1020; *Greenfield v. Villager Industries Inc.,* 483 F.2d 824 (3rd Cir. 1973); *Redmond v. Commerce Trust Co.,* 144 F.2d 705, 708 (8th Cir. 1944); *Goldstein v. Lees,* 46 C.A. 3d 614 120 Cal. Rptr. 1975; and *Gasior v. Wentz,* 89 N.W. 2d 886.

In consideration of the above cited cases petitioner argues that, in the instant case, the Rule 23 (d)(2) notice to the

class (as well as the later 23 (e) notice) was constitutionally deficient and in conflict with *Mullane* for failure to apprise all class members of the Meagher, Geer decision to reassociate the Hvass law firm as class co-counsel and to give all relevant information thereto including facts surrounding the Hvass conflicts of interest; and that prior informed consent was had from the court and defendants but not named plaintiffs. (See *Hansberry* and *Mullane*). (See *Gasior* citing: 7 C.J.S. §80 pp. 898-899 circumscribing attorney from binding client to procedures affecting substantial rights or involving fraud or collusion).

In *Mullane* this Court stated that a constitutional defect (Fourteenth Amendment) in notice is sufficient to deny jurisdiction to the court and deprives judgment(s) of full faith and credit. Therefore, the constitutionally deficient notice here does or *should* nullify judgments rendered by the courts below.

In the court's silent approval or acquiescence in the Hvass re-association the court willfully denied petitioner and all class members rights under FRCP Rule 23(a)(4), *Hansberry, Evitts, Gonzales,* and the Fifth, Sixth, and Fourteenth Amendments to adequate representation and effective counsel. In the conspiracy of silence that, necessarily, surrounded the Hvass re-entry the court and counsel became the witting "captives" of defendant Sperry and defendant IBEW (and Teamster) union's interests. Clearly class counsel could not and did not demand job data discovery on pain of exposing the Larson-Lindquist-Teamster-Hvass-Sperry connections. The fiduciary "guardians" of class members existed only in the more public exhortations of the courts below. (See Mem. Order 1976 pp. 21-22).

A review of the aggressive and continuing assault against the named plaintiffs personally and upon their representative status or "motives" reveals more about the court (and counselor's) prejudice in favor of Teamster/IBEW union interests represented by Hvass and Lindquist law firms Petitioner claims that the lower court's inordinately lengthy dissertation on the "ulterior motives" and risks attending named plaintiff's representation in its memorandum order of 1976 is both fallacious argument and the first manifestation of the court's bias that was confirmed in the court's March 27, 1985 letter to the Eighth Circuit. That the court engaged in fallacious argument is supported by: the court's knowledge that intervenors could be named; in 1975 named plaintiffs suggested that intervenors be joined; and by the *Greenfield* Appeals Court (3rd Cir.) p. 832 at n. 9:

> "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry."

In consideration of the above it becomes manifest that the court could not and did not sit as an impartial tribunal, as this Court and the Constitution would require. The lower court should have recused itself according to U.S.C. 28 §455(a), (b)(1) and surrendered jurisdiction as required under *Mullane* for the constitutional deficiency of a biased tribunal.

Petitioner claims that the Eighth Circuit Court of Appeals acted in defiance of *Mullane's* due process commands under the Fourteenth Amendments in all judgments (subsequent to the Hvass reentry into this case) but particularly with re-

gard to its affirmation of the lower court's judgments of May 31, 1985 and September 10, 1985 attendant to the final judgment order in this case. The Eighth Circuit gave a "rubber stamp" affirmation of the lower court's conclusionary findings in failure to demand confirming evidence from the record as required by the Fourteenth Amendment and the Rules Enabling Act. The Eighth Circuit's conduct conflicts with constitutional requirements and the *Pettway* court at p. 1160:

> "Court of Appeals cannot properly review a district court's findings and conclusions without examining the supporting evidence."

The Fifth Circuit contrasts with the Eighth Circuit in that; the *Pettway* court would also not abide counsel representing the conflicting interests of proponents and opponents of settlement; recognized that class counsel's fee interests may conflict and favor settlement; and would not allow time consumed in litigation or the voluminous file generated to deny due process and equal protection of all of the laws to the class.

Should this Court allow the judgment(s) rendered below to stand uncorrected or unremedied and sufficient to satisfy the due process rights of petitioner and all class members it will have the calamitous effect of signalling that;

1. Named plaintiff client(s) and class member clients have no right of prior informed consent to association of counsel as representatives but that right is reserved to lead class counsel, the court, and to defendants and their counsel.

2. That class counsel can wear two or more hats and represent conflicting interests with impunity.

3. That misinformation or mere mechanics of notice is sufficient to satisfy due process.

4. That perfunctory examination of attorney conflicts satisfies court obligations.

5. That time consumed in discovery and the generating of a voluminous file (not necessarily relevant or useful) will serve to justify large fees, hide inefficiencies or misconduct, and leverage settlement over due process in the name administrative expediency.

6. That activist union members are ill-advised to attempt to exercise two or more of their rights under protective labor and employment laws in the chilling fear of having the protection of neither.

7. That due process for a factory class of women can safely be sacrificed to administrative expediency or the prejudices of the lower courts.

Petitioner claims that the untoward conduct of the courts below and counselors require remedy to the class through the supervisory powers of this Court.

II.

THE DECISIONS BELOW DIRECTLY CONFLICT WITH THE FIFTH, SIXTH & FOURTEENTHS AMENDMENTS TO THE CONSTITUTION

Petitioner argues that the decisions below directly conflict with constitutional rights for all of the reasons, acts of commission or acts of omission set forth in Item I above. The lower court's disregard for the due process rights of petitioner and the plaintiff class may be shown in the contrasting conduct of the lower court with that of the court in *Goldstein*. Where this lower court expressed

irritation that the subject of class due process was interfering with the "more important problem" of determining how much the attorneys were going to be paid (See App. 79-88 pp. 197-198) the *Goldstein* court at pp. 618, 619, 624 stated:

> "Fraud or unfairness on the part of counsel will prevent him from services rendered; etc. and citing the Unclean Hands doctrine at note 2; and at p. 619 n.3 that attorney shall not accept employment adverse to client or former client without informed consent . . .; and at p. 624 to quote "[c]ourts do not sit to give effect to . . . illegal contracts. The law is not subsidized to overthrow itself . . .".

Petitioner further argues that inadequate representation at trial, through the Hvass conflicts of interest was compounded by passive monitoring of defendant's implementation of settlement terms by the court. That passivity was further exacerbated by the court's surrender to defendant Sperry's mere assertions of compliance. Passivity is shown by the court's question as to whether settlement agreement contained references to E.E.O.C. requirements (December 12, 1983 hearing at p. 25) and the court's surrender to Sperry's assertions of compliance as found in Doty's statement at p. 134 of December 27, 1983 hearing minutes: "'. . . relating to assembly matter. There we rely on the fact that our people have told us that has happened and the union has not raised an issue on that."

Passive resistance to Sperry's mere assertions of compliance was also given by class counselor Jones at the December 27, 1983 hearing. His surrender soon followed in advocating that final judgment should stand.

Petitioner argues that none of the conduct on the part of the court and class counselor, as fiduciaries and guardi-

ans of class interests, comport with this Court's decision in *Evetts* with regard to the proscriptions contained in the Fourteenth Amendment against "nominal representation" and the right to due process and equal protection. See below:

> (a) *Nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.*

Final Judgment should not be allowed to stand for the following reasons:

1. Settlement terms abrogate class counselor's representative obligations to the class as required by the Sixth and Fourteenth Amendments, Rule 23, and the Rules Enabling Act.

2. Monitoring and procedures used by the court of first instance were constitutionally deficient for lack of verification of compliance of each settlement term on the record and thus done in violation of the Rules Enabling Act and in repudiation of the court's memorandum order of May 27. 1976, re: diminution of due process rights of the class.

3. Eighth Circuit's affirmation of district court's ruling was constitutionally deficient under the Fourteenth Amendment and the Rules Enabling Act by failure to demand that the court produce recorded evidence of full compliance.

The preponderance of evidence shows defendants not to be in full compliance wtih settlement terms but, instead, should have been held in contempt of court as required by settlement terms. Class is entitled to all appropriate remedy including judgment by default. Class is entitled to full protection of constitutionally guaranteed rights.

III.

THE DECISIONS BELOW DIRECTLY CONFLICT WITH THE RULES ENABLING ACT, 28 U.S.C. 2072 (1966).

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and the courts of appeals of the United States in civil actions . . .
>
> Such rules shall not abridge, enlarge or modify any substantive right. . . ."

Petitioner argues that the decisions below and the rules and procedures adopted and in the conduct of the acts of commission or omission described in Items I and II above the courts below had the effect of abridging and modifying the substantive rights of petitioner and all other class members. The decisions below should not be allowed to stand because it gives license for the subjugation of the rights of the powerless to the powerful, heaps doubt upon the integrity of the adversarial system, the judiciary, the legal profession, and mocks the trust that the Congress placed in the judiciary to give fair effectuation of the social policies embodied in Title VII.

CONCLUSION

In the rulings below and by the acts of commission or omission as recounted in Items I, II, and III above, the lower courts have arrogated unto themselves special powers or immunities to repugn this Court's prior decisions, disregard the Constitution, the Rules Enabling Act, Judicial Canons and to arbitrarily and capriciously repudiate their own prior decisions. By such conduct the courts abuse process and bring disrespect to their office. Petitioner and the class are entitled to a stable and impartial tribunal, judgment by default, or summary judgment, evidentiary hearings as to attorney conflicts and whether final judgment should issue, recission of all attorney fees to the court system or to the benefit of the class, indemnification to the class for monetary awards collected from Sperry, and any other relief or remedy the Court may deem appropriate including appointment of counsel.

Petitioner respectfully requests the petition for a writ of certiorari be granted.

September 9, 1985.

Respectfully submitted,

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